Sabah Gas Industries Sdn Bhd v Trans Samudera Lines (S) Sdn Bhd

HIGH COURT (KOTA KINABALU) — CIVIL SUIT NO K–129 OF 1992
SYED AHMAD IDID J
19 FEBRUARY 1993

Civil Procedure *— Injunction — Application to set aside ex parte injunction — Injunction obtained in Malaysian court ordering stay of arbitration proceedings in London — Non-disclosure of material facts — Service of injunction effected after final award had been made — Whether injunction should be set aside*

Civil Procedure *— Injunction — Application to set aside ex parte injunction — Injunction granting stay of arbitration proceedings not served on defendant personally — Whether personal service required — Injunction served on arbitrator but arbitrator not named as party — Whether injunction should be set aside — Rules of the High Court 1980 O 45 r 7(2)*

Arbitration *— Jurisdiction — Whether court could intervene and assume jurisdiction — Burden on party seeking court's intervention to prove that there were exceptional circumstances for court to assume jurisdiction*

Contract *— Arbitration — Contract provided for arbitration in London according to English law — Plaintiffs refused to submit to arbitration — Ex parte injunction obtained in Malaysian court ordering stay of arbitration proceedings in London — Final award made before service of injunction — Discretion of Malaysian court whether or not to adjudicate — Issues to be considered when exercising discretion*

Arbitration *— Contract — Allegation of fraud — Power given to court to grant relief — Arbitration Act 1952 s 25(2)*

The plaintiffs and the defendants had signed a contract of affreightment ('COA') on 21 September 1990 whereby the plaintiffs chartered the vessels of the defendants for three shipments in respect of carriage and transportation of iron ore from Brazil and Norway. The COA showed that arbitration in London according to English law was preferred. The plaintiffs provided the defendants with the first cargo in February 1992, but not the second and third cargo. On or about 21 April 1992, the defendants through their solicitors, gave notice of commencement of arbitration and proposed three names as arbitrators. The plaintiffs did not respond to the defendants' requests and did not concur nor name any arbitrator. On 18 May 1992, the defendants appointed Graham Clark in London ('the arbitrator') as their own arbitrator and gave notice of this to the plaintiffs on the next day. On 22 May 1992, the plaintiffs refused to submit to arbitration in London but instead they claimed that the dispute should be decided in Malaysia, and further gave formal notice of the rescission of the COA. By telex dated 18 June 1992, the plaintiffs stated that they had rescinded the COA due to the defendants' fraudulent misrepresentations and illegal acts. On 8 July 1992, the defendants requested the arbitrator to make an

award whereupon the arbitrator informed the plaintiffs that he was making an order in peremptory form that the plaintiffs deliver a reply to the defendants' point of claim by 17 July 1992 failing which he would proceed to an award. On 17 July 1992, the plaintiffs through their solicitors informed the arbitrator that papers had been filed in the High Court at Kota Kinabalu to stay arbitration proceedings. Three days later the arbitrator informed the plaintiffs that he would grant the plaintiffs a further extension to 28 July 1992 to submit a reply failing which he would hand down his award. On 28 July 1992, the plaintiffs obtained an ex parte order staying the arbitration proceedings and informed the arbitrator and defendants' solicitors of this by facsimile. On 6 August 1992, the arbitrator handed down his final award and on 10 August 1992, a copy of the order dated 28 July 1992 granting the stay of arbitration proceedings, was served on the defendants' solicitors in Hong Kong. The defendants applied to set aside the ex parte injunction obtained by the plaintiff on 28 July 1992 staying arbitration proceedings and to set aside the writ of summons.

Held, allowing the defendants' application:

(1) Even though the parties had decided to refer disputes to a foreign court, the Malaysian court, where the cause of action in relation to the contract arose and was properly within its jurisdiction, had a discretion whether or not to adjudicate. This discretion should be exercised by considering certain issues.

(2) While s 25(2) of the Arbitration Act 1952 gives the court the power to grant relief when the dispute involves fraud, there were no evidence of fraud in the present action. Even if there was a dispute based upon alleged mistake at the time the contract was entered into or where there was an allegation of misrepresentation or negligent misstatement, these were within the scope of the arbitration.

(3) The Malaysian court can intervene but would do so and assume jurisdiction only in rare cases. The burden was on the party seeking the court's intervention to prove by evidence that the facts and circumstances were so exceptional and in breach of the foreign arbitration/ jurisdiction clause. There was no evidence of exceptional circumstances in the present action.

(4) Where a party makes an ex parte application for an injunction, that party must make full and frank disclosure of all material facts. In this action there was a reference to the appointment of the arbitrator but no full disclosure of the communications between the plaintiffs, the defendants and the arbitrator in relation to that appointment.

(5) The order of 28 July 1992 for stay of arbitration proceedings was only served on the defendants' solicitors on 10 August 1992 by which time the final award had been made in London as at 6 August 1992. Order 45 r 7(2) of the Rules of the High Court 1980 provides that an order shall not be enforced under r 5 unless a copy of the order had been served personally on the person

required to do or abstain from doing the act in question. So indeed the plaintiffs did not comply with the Rules of the High Court 1980 which was detrimental to their interest. Another glaring mishap was that the injunction was directed at Graham Clark but he was nowhere named as a party.

(6) The parties' expression of intention was only prima facie evidence as to the proper law applicable. As a principle of law and practice a court would not enforce a contract which was illegal by its own lex fori but on the evidence, the court found that no illegality had been proved.

Per curiam:

The arbitration resulted in an order dated 6 August 1992 with a finding in favour of the defendants. It seemed clear that the plaintiffs had been given every opportunity to submit and to take part in the arbitration proceedings in London. If indeed they wished to challenge the conduct of the arbitrator and/or the validity of the award made, the proper forum was the High Court in London.

[Bahasa Malaysia summary

Plaintif dan defendan telah menandatangani satu kontrak perjanjian tambang muatan kapal ('kontrak itu') pada 21 September 1990 di mana plaintif telah mencarter kapal-kapal defendan untuk tiga penghantaran berkenaan dengan pengangkutan bijih besi dari Brazil dan Norway. Kontrak itu menunjukkan bahawa timbangtara di London mengikut undang-undang Ingeeris adalah diutamakan (preferred). Plaintif telah membekalkan defendan dengan kargo yang pertama pada Februari 1992, tetapi tidak membekalkan kargo kedua dan ketiga. Pada atau kira-kira pada 21 April 1992, defendan melalui peguamcara mereka telah memberikan notis permulaan timbangtara dan mengemukakan nama tiga orang sebagai penimbangtara. Plaintif tidak memberi jawapan kepada permintaan defendan dan tidak mempersetujui atau menamakan sesiapa sebagai penimbangtara. Pada 18 Mei 1992, defendan telah melantik Graham Clark di London ('penimbangtara itu') sebagai penimbangtara mereka sendiri dan telah memberi notis tentang perlantikan itu kepada plaintif pada keesokkannya. Pada 22 Mei 1992, plaintif telah enggan menyerah kepada timbangtara di London tetapi sebaliknya mereka menuntut bahawa pertikaian itu harus diputuskan di Malaysia. Mereka selanjutnya telah memberikan notis pembatalan kontrak itu. Melalui teleks bertarikh 18 Jun 1992 plaintif menyatakan bahawa mereka telah membatalkan kontrak itu akibat salahnyataan defendan yang palsu dan kelakuan defendan yang salah di sisi undang-undang. Pada 8 Julai 1992, defendan meminta penimbangtara membuat suatu award bilamana penimbangtara memberitahu plaintif bahawa beliau akan membuat satu perintah dalam bentuk 'preemptory' supaya plaintif menyampaikan jawapan kepada tuntutan defendan sebelum 17 Julai 1992 dan jika plaintif gagal berbuat demikian, beliau akan terus

memberi award itu. Pada 17 Julai 1992, plaintif melalui peguamcara mereka memberitahu penimbangtara bahawa permohonan telah difailkan di Mahkamah Tinggi di Kota Kinabalu untuk menggantung prosiding timbangtara. Tiga hari selepas itu, penimbangtara telah memberitahu plaintif bahawa beliau akan membenarkan plaintif satu lagi perlanjutan masa sehingga 28 Julai 1992 untuk mengemukakan satu jawapan dan jika plaintif gagal berbuat demikian beliau akan membuat awardnya. Pada 28 Julai 1992, plaintif telah memperolehi satu perintah ex parte menggantung prosiding timbangtara itu. Mereka kemudiannya memberitahu penimbangtara dan peguamcara defendan tentang hal ini melalui faks. Pada 6 Ogos 1992, penimbangtara telah membuat award muktamadnya dan pada 10 Ogos 1992, satu salinan perintah bertarikh 28 Julai 1992 menggantung prosiding timbangtara itu telah disampaikan kepada peguamcara defendan di Hong Kong. Defendan telah membuat permohonan untuk mengetepikan injunksi ex parte yang telah diperolehi oleh plaintif pada 28 Julai 1992 untuk menggantung prosiding timbangtara itu dan untuk mengetepikan writ saman itu.

Diputuskan, membenarkan permohonan defendan itu:

(1) Walaupun pihak-pihak itu telah membuat keputusan untuk merujuk pertikaian itu kepada satu mahkamah luar negeri, mahkamah Malaysia, di mana kausa tindakan berkenaan dengan kontrak itu timbul dan yang sememangnya berada di dalam bidang kuasanya, mempunyai budibicara sama ada atau tidak untuk memutuskan perkara itu. Budibicara ini harus dijalankan dengan mempertimbangkan beberapa isu yang tertentu.

(2) Sedangkan s 25(2) Akta Timbangtara 1952 memberikan mahkamah kuasa memberi relif apabila pertikaian itu meliputi penipuan, tidak ada kesan-kesan penipuan di dalam tindakan ini. Biarpun terdapat pertikaian berdasarkan kesilapan (mistake) yang didakwa pada masa apabila kontrak itu diikat atau di mana terdapat satu dakwaan salah nyataan atau salah nyata cuai ini termasuk dalam batasan timbangtara.

(3) Mahkamah Malaysia boleh bercampur tangan tetapi akan berbuat demikian dan mengambil alih bidang kuasa cuma dalam kes-kes yang khas. Beban terletak pada pihak yang memohon campur tangan mahkamah untuk membuktikan dengan keterangan bahawa fakta-fakta dan keadaan kes adalah begitu luar biasa dan mengingkari fasal timbangtara/bidang kuasa luar negeri. Tidak terdapat keterangan keadaan kes yang begitu luar biasa dalam kes ini.

(4) Di mana suatu pihak membuat satu permohonan ex parte untuk satu injunksi, pihak itu mestilah mendedahkan kesemua fakta-fakta yang penting sepenuhnya tanpa menyelindungi apa-apa. Dalam tindakan ini, terdapat rujukan kepada perlantikan penimbangtara tetapi tidak ada pendedahan sepenuhnya komunikasi di antara plaintif, defendan dan penimbangtara berkenaan dengan perlantikan itu.

(5) Perintah bertarikh 28 Julai 1992 itu untuk penggantungan prosiding timbangtara cuma disampaikan kepada peguamcara defendan pada 10 Ogos 1992 dan pada ketika itu award muktamad telah pun dibuat di London pada 6 Ogos 1992. Aturan 45 k 7(2) Kaedah-Kaedah Mahkamah Tinggi 1980 memperuntukkan bahawa satu perintah tidak boleh dikuatkuasakan di bawah k 5 melainkan jika satu salinan perintah itu telah disampaikan kepada diri orang yang dikehendaki membuat atau menahan daripada membuat langkah yang dipersoalkan. Jadi sememangnya plaintif tidak mematuhi Kaedah-Kaedah Mahkamah Tinggi 1980 yang membawa kesan buruk ke atas kepentingan mereka. Satu lagi kesilapan yang ketara adalah fakta bahawa injunksi itu diarahkan kepada Graham Clark tetapi beliau tidak di mana-mana dinamakan sebagai satu pihak.

(6) Hasrat yang telah dinyatakan oleh kedua-dua pihak cuma membentuk keterangan prima facie tentang undang-undang yang patut dipakai. Sebagai satu prinsip undang-undang dan amalan sebuah mahkamah tidak boleh menguatkuasakan suatu kontrak yang tidak sah melalui lex fori ianya sendiri tetapi mengikut keterangan, mahkamah mendapati bahawa tiada ketaksahan yang telah dibuktikan.

Per curiam:
Timbangtara itu berkesudahan dengan satu perintah bertarikh 6 Ogos 1992 dengan satu keputusan yang memihak kepada defendan. Nampaknya jelas bahawa plaintif telah diberi peluang untuk menyerah dan mengambil bahagian di dalam prosiding timbangtara di London. Jika sememangnya mereka hendak melawan kelakuan penimbangtara itu dan/atau kesahan award yang telah dibuat, forum yang betul adalah Mahkamah Tinggi di London.]

Notes
For cases on ex parte injunctions, see 2 *Mallal's Digest* (4th Ed) paras 1028–1029.
For a case on an application to set aside an injunction, see 2 *Mallal's Digest* (4th Ed) para 1041.

Cases referred to
1 *Globus Shipping & Trading Co (Pte) Ltd v Taiping Textiles Bhd* [1976] 2 MLJ 154 (folld)
2 *The Eleftheria* [1969] 2 All ER 641 (refd)
3 *San Kong Letrik Sdn Bhd v Lembaga Letrik Negara Tanah Melayu & Anor* [1992l 1 CLJ 190 (refd)
4 *Malaysian Government Officers' Co-operative Housing Society Ltd v United Asia Investment Ltd & Ors* [1972] 1 MLJ 113 (refd)
5 *Lai Siew Wah Sdn Bhd v Ng Chin* [1988] 1 MLJ 393 (refd)
6 *Ashville Investments v Elme Contractors* [1988] 2 All ER 577; [1988] 3 WLR 867; (1987) 37 Build LR 55 (refd)
7 *Cohen v Rothfield* [1919] 1 KB 410 (refd)

A 8 *Bristol Corporation v Aird (John) & Co* [1913] AC 241 (refd)
9 *The Vishva Apurva* (unreported) (refd)
10 *Azimullah v Master of the SS 'Haldor' & Ors* [1965] 1 MLJ 248 (refd)
11 *Amerco Timbers Pte Ltd v Chatsworth Timber Corporation Pte Ltd* [1977] 2 MLJ 181 (refd)
B 12 *Grace Shipping Inc & Anor v CF Sharp & Co (Malaya) Pte Ltd* [1987] 1 MLJ 257 (refd)
13 *Cocoa Processors Sdn Bhd v United Malayan Banking Corporation Bhd & Ors* [1988] 3 MLJ 491 (refd)
14 *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd & Ors* [1992] 2 Lloyds Rep 7 (refd)
C 15 *Dimskal Shipping Co SA v International Transport Workers Federation* [1992] 1 Lloyds Rep 115; [1991] 3 WLR 875 (refd)
16 *Doleman & Sons v Ossett Corporation* [1912] 3 KB 257 (distd)
17 *The Sungei Bulan* [1983] 2 MLJ 377 (refd)
18 *Re Helbert Wagg & Co's Claim* [1956] Ch 323; [1956] 1 All ER
D 129; [1956] 2 WLR 183 (refd)

Legislation referred to
Arbitration Act 1952 s 25 (2)

Clement A Skinner (*Skinner Lind Robertson Willie Wong & Chin*) for the
E defendants.
Alex Decena (*Jayasuriya Kah & Co*) for the plaintiffs.

Syed Ahmad Idid J: The plaintiffs, through their ex parte summons-in-chambers of 17 July 1992, applied for an order that the defendants be restrained from further participating in the arbitration proceedings then
F being conducted in London and a further order that the 'forum conveniens most suitable in the circumstances of this case be the Regional Centre for Arbitration (UN) Kuala Lumpur'. The plaintiffs also asked that 'the court do appoint the said centre or another body acceptable to the court to be the nominating body for an arbitration'. Additionally, the plaintiffs also sought
G for an order that the proceedings in progress at that time was 'illegal, unlawful, null and void, alternatively that in the event the same is held to be validly in progress, the same be stayed pending the full and final disposal of this action'.

Mr Alexander Decena put forth the submission for the plaintiffs at the ex parte hearing in chambers and obtained an order on 28 July 1992 that the
H arbitration proceedings conducted by Graham Clark (of an address in London) be stayed until further order.

The plaintiffs' claims were for a declaration that the charter party or contract of affreightment ('COA') has been rescinded and deemed determined in law, alternatively void for uncertainty; and for the other
I orders which I have set out at the introduction above and for costs. A COA is one for the carriage of goods in a ship. In practice these contracts are usually expressed in writing and most frequently in one or other of two types of documents called respectively a charter party and a bill of lading. See *Halsbury's Laws of England* and Maclachlan on *Merchant Shipping*.

The defendants on 5 November 1992 filed separate summons-in-chambers, the first, to set aside the injunction and the second, to set aside the writ of summons on the following grounds:

(i) the plaintiffs and the defendants having incorporated the terms and conditions as in attachments A and B, agreed to refer *to arbitration in London according to English law* the matters in respect of which this action is brought;
(ii) the plaintiffs' claim therefore does not give rise to a cause of action to be adjudicated by the Malaysian court or by the Regional Centre for Arbitration (UN) Kuala Lumpur; and
(iii) the plaintiffs' claim is res judicata.

As the facts unfold themselves, we see that the Iraq-Kuwait war did have some impact on the COA which both parties had signed on 21 September 1990. The Iraqi invasion of Kuwait took place on 2 August 1990 and the problems abated on 2 March 1991. See defendants' exhs HAR-1A with additional cll 25–36 at HAR-1B, and additional cll 44–62 at HAR-1C. These correspond to those submitted by the plaintiffs as exhs OCW-7, OCW-5, OCW-6, OCS-3 and OCW-4. By the addendum, it was agreed that other terms will also apply, ie attachment B (or OCW-B/HAR-1B) also known as Iron Ore Charter Party Vale do Rio Doce terms 1967 with additional cll 44–62 where charterer declare load port Narvich, Norway, or attachment A (or OCW-3/HAR-1C if charterer declare load port Tubarao, Brazil). This is a copyright, published by the Baltic & International Maritime Conference ('BIMCO'), Copenhagen code-name 'OREVOY' with additional cll 25–36. I am unable to accept any contention that these do not form part of the agreements taking into consideration the very nature of the transactions. Maritime practices accept such additions. This is on account of the way ships are chartered, loaded and run. I cannot see how plaintiffs' submission that the contract is void for uncertainty can be acceptable.

The plaintiffs, being a company that produce hot briguette iron (HBI) methanol and electricity, obtain raw material in the form of iron ore from various sources around the world. They do not own their own fleet of ships. They go to the open market to charter vessels for the carriage and transportation of iron ore. Accordingly, they entered into a COA for the lifting of their iron ore from Brazil and Norway. This, Mr Alex Decena submits, was *'allegedly'* done by the plaintiffs. The defendants, on the other hand, claim that two other shipments are outstanding under the COA. Plaintiffs then deny this and allege that the COA (which they signed in 1990) is (in 1992) void for uncertainty and fraught with misrepresentation and illegality. I do not propose to go into the reasons which Mr Decena puts forth. The very arguments cannot stand when faced with the facts and the law.

It will be useful to describe a little regarding the additional clauses. Attachment A at its Pt I within Box 31, under column 'Law and Arbitration', is inserted 'London'. This was *typed* in. Part II at cl 23.1 (at HAR-1B) states that it is agreed that *'this charterparty shall be governed by English law ... and disputes ... shall be referred to arbitration in London'*. This was deliberately selected over cl 23.2 which provided for arbitration in New York. Accordingly

A cl 23.2 was deleted. Such agreement shows that arbitration in London according to English law was preferred.

Further provisions of the charterparty include:

> Clause 41
> This contract shall be governed by English law.

B

> Clause 42
> Any dispute arising under this contract shall be settled by arbitration in London in accordance with the arbitration law and procedure prevailing there.

In both these clauses the words 'English' and 'London' had been inserted respectively in type, thereby showing that arbitration in *London* according C to *English law* had been the subject of agreement.

> Clause 58
> Penalty for non-performance is proven damages but not exceeding amount of freight.

D *Finding*

The plaintiffs provided the defendants with the first cargo (albeit later than the stipulated period) in February 1992, but not the second and third cargo.

On or about 21 April 1992, the defendants, through their solicitors, gave E notice of commencement of arbitration and proposed three names as arbitrators. The plaintiffs did not respond to the defendants' requests and did not concur nor name any arbitrator. The defendants on 18 May 1992, appointed Mr Graham Clark in London as their own arbitrator and gave notice of this to the plaintiffs on the next day. See s 7(b) of the English F Arbitration Act 1950.

On 22 May 1992, the plaintiffs refused to submit to arbitration in London. Instead they claimed that the dispute should be decided in Malaysia. What the plaintiffs in the instant case should have done but did not do was to have challenged the arbitrator's jurisdiction in which case it may have been necessary to adjourn to provide an opportunity for application to the G High Court (in London) under s 2 of the English 1979 Act.

On 8 July 1992, the defendants requested the arbitrator to make an award whereupon the arbitrator informed the plaintiffs that he was making an order in 'pre-emptory' form that the plaintiffs deliver a reply to the defendants' points of claim by 17 July 1992 failing which he would proceed H to an award.

On 17 July 1992, the plaintiffs through their solicitors informed the arbitrator that papers had been filed in the High Court at Kota Kinabalu to stay the arbitration proceedings. Three days later, the arbitrator informed the plaintiffs that he would grant a further extension to 28 July 1992 to submit a reply failing which he would hand down his award.

I On 28 July 1992, the plaintiffs obtained an ex parte order staying the arbitration proceedings and informed the arbitrator and defendants' solicitors of this by facsimile. To fully appreciate the situation, it is necessary to refer to the order in full.

On 6 August 1992, the arbitrator handed down his final award. A

On 10 August 1992, a copy of the order of 28 July 1992 granting the stay of arbitration proceedings was served on the defendants' solicitors in Hong Kong.

Mr C Skinner, who challenges the jurisdiction of the Malaysian court to hear this action on the ground that there is an arbitration/foreign tribunal clause in the COA, nevertheless accepts that the court in Malaysia (the B High Court in Borneo) 'has a residual discretion whether or not to assume jurisdiction'. In answer to that, the plaintiffs argue that 'if the point in dispute is whether the contract containing the (arbitration) clause was ever entered into at all, or was void ab initio, illegal or obtained (for example) by fraud, duress or undue influence, the clause does not apply ...'. (See 2 C *Halsbury's Laws of England* (4th Ed) at p 289.) Secondly, the plaintiffs' claim that as both parties are Malaysians, and that the contract was executed in Malaysia, they cannot avoid the application of Malaysian law or the jurisdiction of Malaysian courts even though *the contract provides for English law and arbitration in London* (emphasis to distinguish what is in reality and what is now claimed after both had signed the contract). The plaintiffs cite D Pollock & Mulla on *Indian Contract and Specific Relief Acts* (10th Ed) at p 11:

> ... an Indian citizen making a contract whilst in India would not be able and cannot be permitted to avoid the applicability of the Indian law to the contract made in India or to be performed in part or whole in India. E

Further on in the same page the authors write:

> If a contract made between a party in India and a party in Italy and the contract is illegal under the law of India, the arbitration agreement and the entire proceedings following thereon are illegal and the award would be tainted with the same infirmity. F

In a landmark case in Malaysia, the Federal Court in *Globus Shipping Trading Co (Pte) Ltd v Taiping Textiles Bhd*[1] decided that even though parties had decided to refer disputes to a foreign court, the Malaysian court, where the cause of action in relation to the contract arises and is properly within its jurisdiction, has a discretion whether or not to adjudicate. On G p 155 the court adopted the decision of Brandon J in *The Eleftheria*[2] in how this discretion should be exercised:

(a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts. H
(b) Whether the law of the foreign court applies and, if so, whether it differs from English (or Malaysian as in our case) law in any material respects.
(c) With what country either party is connected, and how closely.
(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.
(e) Whether the plaintiffs would be prejudiced by having to sue in the I foreign court because they would:

    (i) be deprived of security for their claim;
    (ii) be unable to enforce any judgment obtained;

(iii) be faced with a time-bar not applicable in England (or Malaysia as in our case); or

(iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

On the facts as found in our case, the answer to (a) above can only mean that the defendants have the choice as the plaintiffs did not honour their part of the bargain. The observations as to the other areas are that, in respect of (b) the law is similar; (c) with Malaysia but London too is closely connected in that if there had been any failure by the defendants to convey the goods from Brazil or Norway, the parties could easily arbitrate in London, calling witnesses from either country to attend and to attest; (d) the plaintiffs appear to seek a way out and not honour their agreement; and (e) there is no proof thus far of any prejudice and the plaintiffs have not advanced any iota of testimony in support.

The plaintiffs signed the contracts on 21 September 1990. It is sad to observe that only now they allege illegality and misrepresentation by the defendants: (i) in that ss 8, 9 and 36 of the Exchange Control Act 1953 prohibit such a transaction; (ii) that by s 24 of the Contracts Act 1950, the contract is unlawful and void. The arguments that the defendants are not 'deponent owners' is not valid as plaintiffs seem to be at odds with what exists in practice. The plaintiffs only wrote to the defendants on 22 May 1992 after the plaintiffs failed to comply with their terms in the contract. The claim that the shipment was covered by MV Carbonesti and not MV Locust or the MV Orinoco is not fatal as the contract clearly spells out 'or substitute'. While s 25(2) of the Arbitration Act 1952 gives the court the power to grant relief when the dispute involves fraud, here there is no evidence of fraud. (cf *San Kong Letrik Sdn Bhd v Lembaga Letrik Negara Tanah Melayu & Anor.*[3]) Compare what is stated in Mustill and Boyd in the *Law and Practice of Commercial Arbitration in England* (2nd Ed) at pp 135 and 502 and *Malaysian Government Officers' Co-operative Housing Society Ltd v United Asia Investment Ltd & Ors.*[4] In accordance with the Supreme Court's ruling in *Lai Siew Wah Sdn Bhd v Ng Chin*[5], I am unable to find fraud against the defendants on the evidence adduced by the plaintiffs. Even if there was dispute based upon alleged mistake at the time the contract was entered into or where there was an allegation of misrepresentation or negligent mis-statement, these are within the scope of the arbitration. See *Ashville Investments v Elme Contractors.*[6]

I am of the opinion that the Malaysian court can intervene but will do so and assume jurisdiction only in rare cases. Such power will be resorted to with great care and on ample evidence produced that the action abroad is really vexatious and useless. (See *Cohen v Rothfield;*[7] and *Bristol Corporation v John Aird & Co*[8] per Lord Moulton at pp 256–257.) The burden is on the party seeking the court's intervention to prove by evidence that the facts and circumstances are so exceptional and in breach of the foreign arbitration/jurisdiction clause. (See *The Vishva Apurva;*[9] *Azimullah v Master of the SS 'Haldor' & Ors;*[10] and *Amerco Timbers Pte Ltd v Chatsworth Timber Corporation Pte Ltd.*[11])

By the affidavit of Ong Chip Wan, there is no evidence of exceptional circumstances. The fact that two Malaysians signed a contract is common

nowadays with many commercial activities and diverse interests being generated in the world. From the facts which emerged only at the hearing on 2 December 1992 but which had not been put in at the ex parte stage of the plaintiffs' summons-in-chambers, it is manifest that after the first shipment of the plaintiffs' goods, the plaintiffs asked that the defendants reduce the freight rates. See para 13 of Hussain Abdul Rahman's affidavit. Also Ong Chip Wan says: 'the parties are free to negotiate two other liftings.' But when the defendants asked for the liftings, the plaintiffs then decided that the 'agreement be terminated'. The Privy Council report in *Grace Shipping Inc & Anor v CF Sharp & Co (Malaya) Pte Ltd*[12] is illustrative.

How crucial is non disclosure of material facts? Where a party makes an ex parte application for an injunction, that party must make full and frank disclosure of all material facts. (See *Cocoa Processors Sdn Bhd v United Malayan Banking Corporation Bhd & Ors.*[13]) There was no real attempt to reveal the relevant provisions of the arbitration clause. There as a reference to the appointment of the arbitrator but no full disclosure of the communications between the plaintiffs, the defendants and arbitrator in relation to that appointment. When one looks at the telexes and the communications, these tell a very different story, a story of default by the plaintiffs in not nominating liftings by the due dates (see HAR 7A–7H encl 8); of attempt to exercise option to cancel the charterparty because the period of laycans had expired (see HAR 8E encl 8); of a request to refrain from arbitration (see HAR 8F and 8I encl 8); of an attempt to make the defendants perform the carriage at reduced rates (see HAR 8L encl 8); but when this was refused, the allegations of misrepresentations, illegality were then quickly put up. (See exhs 7 and 8 of Hussain Abdul Rahman's affidavit of 22 October 1992.) Are these allegations with substance? The allegations of fraud and misrepresentation arose as an afterthought and as a convenient way to deny or terminate the contract. It should be noted that the COA was signed in September 1990. That was a time of great uncertainty and yet the defendants took up their position and accepted a business risk. (See para 13 of Hussain Abdul Rahman's affidavit of 22 October 1992.) If shipping rates had gone up, the defendants would still be obliged to perform the contract. The complaint regarding misrepresentation was only raised two years later in May 1992 (see HAR 8M encl 8), after the defendants refused to lower freight rates and insisted on their rights.

The telexes from the defendants to Captain James Anggang of the plaintiffs (at HAR 8) tell a chilly story of how the defendants were trying hard to keep the bargain alive when the plaintiffs did not perform their part. Captain Anggang should be experienced enough to know his responsibilities and to have briefed his superiors. Mr Seeto Yee, the plaintiffs' managing director, then took a surprise stand stating that the plaintiffs would not submit to arbitration under English law (see HAR 8M dated 22 May 1992) and also wrote a startling letter to the defendants as follows: 'We hereby formally give you notice [on 28 May 1992] that the above named charterparty is rescinded and deemed null and void ab initio.'

This was after the plaintiffs had enjoyed the loading of one shipment a year before. Such was the breach of a validly binding contract between two commercial organizations doing business in the world at large. By telex at

HAR 8(O) dated 18 June 1992, the plaintiffs stated that they 'have rescinded the above contract due to your [defendants'] fraudulent misrepresentations and illegal acts ... we are seeking legal advice to take actions against you'. The telex dated 3 July 1992 from 'Sativale & Associates of Subang Jaya' for the first time revealed that they were acting for the plaintiffs. The language used in that telex was 'rather emotional'.

From the above outline in chronological order, it may appear that the arbitrator was hurrying to get his award out. If the court allows itself to become emotional, it can deduce that the arbitrator was rushing to beat the court order which was made on 28 July 1992, the same date that Graham Clark set for the plaintiffs for submission of points of defence and counterclaim. See the full chronology of events in the affidavit of Hussain Abdul Rahman affirmed on 18 September 1992 at paras 12(i)–(xiii). The arbitration resulted in an order dated 6 August 1992 with a finding in favour of the defendants. It seems clear that the plaintiffs have been given every opportunity to submit and to take part in the arbitration proceedings in London. If indeed they wished to challenge the conduct of the arbitrator and/or the validity of the award made, the proper forum was the High Court in London.

Was the order of the High Court in Borneo at Kota Kinabalu served on the London arbitrator before he made the award? His final award (see HAR 6) sets out quite extensively the background and the foreplay, as it were, leading to the arbitration. Sadly, the Kota Kinabalu High Court order was only served on the defendants' solicitors on 10 August 1992 by which time the final award had been made in London. By O 45 r 7(2) of the Rules of the High Court 1980, an order shall not be enforced under r 5 unless a copy of the order has been served personally on the person required to do so or abstain from doing the act in question. Rule 5 refers to enforcement of judgment to do or abstain from doing an act. So indeed the plaintiffs did not comply with the Rules of the High Court 1980 which is now detrimental to their interests.

Another glaring mishap in the plaintiffs' case is that the injunction was directed at Graham Clark but he was nowhere named as a party. See Goldrein & Wilkinson's *Commercial Litigation, Pre-emptive Remedies* (2nd Ed, 1991) (Sweet & Maxwell).

The recent judgment of the Court of Appeal in England, *The Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd & Ors*[14] is against the plaintiffs. This court agrees with the decision despite Mr Alex Decena's attempt to distinguish that decision. Lord Goff of Chievely in *Dimskal Shipping Co SA v International Transport Workers Federation*[15] expresses the opinion that '... if a person enters into such a contract (ie one governed by some other system of law), he has for most purposes to accept the regime of the proper law of the contract ...'. *Arbitration Law* (Lloyd's of London Press Ltd) at ch 6 p 6-2 describes several instances of the general rule. Though the Court of Appeal held in *Doleman & Sons v Ossett Corporation*[16] that it was not competent for the engineer there to determine the matters in question, that case is distinguished from the instant case as there the engineer made the award without notice to the parties and without the knowledge or consent of the plaintiffs. And *The Sungei Bulan*[17] granted a

stay of one month 'during which time the defendants were to commence arbitration proceedings in London'.

The parties' expression of intention is only a prima facie evidence as to the proper law applicable. (See *Re Helbert Wagg & Co's Claim.*[18]) Whether the proper law applicable is the lex contractus or lex solutionis is a matter of presumption and where the parties have expressed themselves (as here) the intention so expressed overrides presumption. Of course as a principle of law and practice a court will not enforce a contract which is illegal by its own lex fori but on the evidence such as I have, no illegality has been proved.

I now order that:

(a) the injunction granted by this court on 28 July 1992 be set aside on the grounds that:

  (i) the service of the order was effected after the award had been made;
  (ii) the injunction had been obtained by non-disclosure of material facts;
  (iii) the arbitration was in accordance with the COA which both plaintiffs and defendants had signed; and
  (iv) the plaintiffs had failed to establish fraud; and

(b) the writ of summons be set aside as:

  (i) the plaintiffs and the defendants had signed the COA on 21 September 1990 and are bound by the terms which men of commerce such as the plaintiffs and defendants can understand; and
  (ii) the plaintiffs' claims do not merit any adjudication by this court as the basis of the claim fails due to there being no cause of action or substance proved.

That in short, is my conclusion based on the lengthy evidence and discussion of the legal principles and the applicable laws.

Order accordingly.

Reported by Yap Foo Ken